Smith v. The Abandoned Vessel

Doc. 92

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

NATHAN SMITH *Plaintiff,*	§ § §	
v.	§ §	CIVIL ACTION NO. 4:07-00784
THE ABANDONED VESSEL, *In Rem*	§ § §	

**INTERVENOR TEXAS HISTORICAL COMMISSION'S
MOTION TO DISMISS OR FOR JUDGMENT**

TO THE HONORABLE JUDGE OF THE COURT:

The Texas Historical Commission, an agency of the State of Texas, ("Commission") files this Motion to Dismiss for Failure to State a Claim and, in the alternative, Motion for Judgment on the Pleadings and would respectfully show the Court the following:

1. The Commission moves to dismiss this complaint pursuant to FED. R. CIV. P. 12 (b)(6) because there is no set of facts that would entitle Plaintiff to relief. Plaintiff attempts to invoke the admiralty jurisdiction of the Court, but, as the Commission will show, there is no case in admiralty because the area claimed by Plaintiff as the location of the alleged shipwreck has been transferred to the State of Texas by Congress through the Abandoned Shipwreck Act, 43 U.S.C. §§ 2101-2106 ("ASA"). The Commission further moves for Judgment on the Pleadings under FED. R. CIV. P. 12 (c), because even accepting all of Plaintiff's allegations as true, the Commission is entitled to a judgment in its favor in this case.

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MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

2. The Commission will demonstrate that the Plaintiff does not state a claim upon which relief may be granted. There are some factual issues in this lawsuit, but none are material to this Motion. The Commission will demonstrate that no matter how these fact issues are resolved, Plaintiff fails to state a claim. Those fact issues include whether the alleged shipwreck is located on private land as alleged by Mrs. Sorenson or in or under a navigable waterway as alleged by Mr. Smith, and whether the alleged shipwreck is abandoned or not.

LOCATION OF THE ALLEGED SHIPWRECK

3. Based on the pleadings in this case, there are only two possible locations for the alleged shipwreck: privately owned land or on or under a navigable waterway. If the shipwreck is on privately owned land, including in, on, or under a waterway that is not navigable and therefore subject to private ownership, it would belong to the landowner and there would be no admiralty jurisdiction. Admiralty jurisdiction has been limited as follows:

> We thus define navigable water for purposes of admiralty jurisdiction as a body of water which, in its present configuration, constitutes a highway of commerce, alone or together with another body of water, between the states or with foreign countries over which commerce in its current mode is capable of being conducted.

Alford v. Appalachian Power Co., 957 F.2d 30, 32 (4th Cir. 1991); *see also*, *Hardwick v. Pro-Line Boats, Inc.*, 895 F.Supp. 145 (S.D.Tex. 1995).

4. The United States Supreme Court's test of "navigable" for admiralty jurisdiction requires that bodies of water be either (1) currently used in navigation or (2) capable of navigation in their ordinary condition. *The Daniel Ball,* 77 U.S. (10 Wall.) 557,

563 (1870). Thus, if the wreck is on land, it is not subject to the admiralty jurisdiction of this Court and Plaintiff's claim fails.

5. Neither could Plaintiff claim a right as a finder under the common law. Under Texas law, if a person trespasses onto real property and takes possession of abandoned personal property, such an act is wrongful and no title to the property is created in him; instead, title rests in the owner of the soil, and the wrongdoer is liable for the trespass and for conversion. *Ingram v. State*, 261 S.W.3d 749 (Tex.App.–Tyler 2008, no pet.). It is clear from Mrs. Sorenson's pleading that Mr. Smith does not have permission to enter this land and is a trespasser on this land. Intervenor Sorenson's Motion to Dismiss at 3, ¶¶ 7-8.

6. Without considering whether or not the Mission River is a navigable waterway, it is still possible to establish that Plaintiff does not have a cause of action in admiralty. Under the ASA, the federal government asserts title to any abandoned shipwreck that is embedded in or on the submerged lands of a state. 43 U.S.C. § 2105 (a). The term "shipwreck" as used in the ASA, includes the cargo and contents of the vessel. 43 U.S.C. § 2102 (d). The United States has transferred title to any such shipwreck in the submerged lands of Texas to the State of Texas. 43 U.S.C. § 2105 (c). Accordingly, if Mr. Smith has located an abandoned shipwreck in the submerged waters of the State of Texas, the vessel and its contents belong to the State of Texas.

7. Merely giving title to the State could allow a salvor to recover the vessel, and Plaintiff could have a claim. Under salvage law, the salvor receives only a lien in the property, not title, subject to an award for the salvage operation. *R.M.S. Titanic, Inc. v.*

Wrecked and Abandoned Vessel, 286 F.3d 194, 204-5 (4th Cir. 2002). However, the ASA not only gives title to the shipwreck to the State, it also removes the issue from the admiralty jurisdiction of the federal court. "[U]nder the ASA, the federal courts lack jurisdiction over a salvor's *in rem* admiralty claims." *Great Lakes Exploration Group, LLC v. Unidentified Wrecked and Abandoned Sailing Vessel*, 522 F.3d 682, 688 (6th Cir. 2008). In short, Mr. Smith has no claim in admiralty because the ASA applies to this case.

8. Since the ASA removes the shipwreck entirely from the admiralty jurisdiction of the Court, there is no right of salvage and Mr. Smith fails to state a claim upon which relief may be granted. This is consistent with Texas law, where the permission of the Commission is required to excavate or remove any artifact embedded in the lands, submerged or not, of the State. TEX. NAT RES. CODE § 191.054-55. So whether the alleged wreck is on or under land of Mrs. Sorenson or of the State, Plaintiff has not stated a claim and this lawsuit should be dismissed.

ABANDONMENT

9. Another fact question that might bear on the jurisdiction of the Court is whether the alleged shipwreck is, in fact, abandoned. While none of the parties to this lawsuit contest the issue of abandonment, other courts have held that a state seeking to prove a claim under the ASA must prove abandonment by clear and convincing evidence. *Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel, Captain Lawrence*, 177 F.3d 491, 500 (6th Cir. 1999). The Sixth Circuit noted different tests to be applied in determining whether abandonment had occurred: whether abandonment could be inferred from circumstances or

had to be specifically expressed by the former owner. *Id.* Specifically, the Court noted that other courts had held that the United States (and by implication other sovereign nations) could only abandon a vessel through an express Congressional declaration. *See United States v. Pennsylvania & Lake Erie Dock Co*,.272 F. 839, 843 (6th Cir. 1921).

10. Thus, to establish whether Plaintiff has stated a claim upon which relief could be granted, the Court should consider the effect of a determination that the shipwreck is or is not abandoned. First, if the ship is determined to be abandoned, it meets the requirements of the ASA for the State to assert its ownership. 43 U.S.C. § 2105 (c). The State of Texas, through the Commission, does assert its ownership interest in the alleged vessel.

11. If the vessel is not abandoned, Mr. Smith still has not stated a claim upon which relief may be granted. Based on the pleadings, the ship is alleged to be a Spanish treasure ship. Such vessels were military ships and the owner would be the sovereign government of Spain. The vessel would be covered by the Sunken Military Craft Act ("SMCA"), Pub.L. 108-375, Div. A, Title XIV, §§ 1401 to 1408, 118 Stat. 2094, Oct. 28, 2004. That law would prohibit a salvage operation such as Plaintiff proposes.

12. The SMCA provides as follows:

> Sec. 1408. Definitions. "In this title [this note]:"(1) Associated contents.--The term 'associated contents' means--
> "(A) the equipment, cargo, and contents of a sunken military craft that are within its debris field; and
> "(B) the remains and personal effects of the crew and passengers of a sunken military craft that are within its debris field.
> "(2) Secretary concerned.--The term 'Secretary concerned' means--
> "(A) subject to subparagraph (B), the Secretary of a military department; and
> "(B) in the case of a Coast Guard vessel, the Secretary of the Department in which the Coast Guard is operating.

"(3) Sunken military craft.--The term 'sunken military craft' means all or any portion of--
"(A) any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on military noncommercial service when it sank;
"(B) any sunken military aircraft or military spacecraft that was owned or operated by a government when it sank; and
"(C) the associated contents of a craft referred to in subparagraph (A) or (B), if title thereto has not been abandoned or transferred by the government concerned.

Section 1406. Relationship to other laws. * * *
"(c) Law of finds.--The law of finds shall not apply to--
"(1) any United States sunken military craft, wherever located; or
"(2) any foreign sunken military craft located in United States waters.
"(d) Law of salvage.--No salvage rights or awards shall be granted with respect to--
"(1) any United States sunken military craft without the express permission of the United States; or
"(2) any foreign sunken military craft located in United States waters without the express permission of the relevant foreign state."

13. Under section 1408 (3)(C) of the SMCA, the Act applies where a vessel was a ship of a foreign government and has not been abandoned by that government. Accepting Mr. Smith's assertions that the vessel in question here was a Spanish treasure ship, it would have been owned by the King of Spain, and the title would have passed to the sovereign government of the Republic of Spain today. Under section 1406 of the SMCA, the law of finds does not apply and there is no right of salvage without the express permission of the Spanish government. Mr. Smith has not alleged or proven that he has the express permission of the Spanish government.

14. The Commission has demonstrated that there is no set of facts that will establish a claim upon which relief may be granted. If the alleged vessel is on private land, there is no admiralty jurisdiction to allow this Court to move forward on this claim. If the

alleged vessel is in or under a navigable waterway, Mr. Smith's claim is blocked by one of two federal laws. If the vessel is abandoned, the ASA gives all rights to the vessel to the State of Texas and takes it out of the admiralty jurisdiction of the Court. If the vessel is not abandoned, the SMCA controls and salvage is not allowed without the express permission of the government of Spain. Thus, Mr. Smith has failed to state a claim upon which relief may be granted.

MOTION FOR JUDGMENT ON THE PLEADINGS

15. In the alternative, the Commission moves for judgment on the pleadings under Fed. R. Civ. P 12 (c). Recognizing that this case has been tried to the Court and that the Commission is intervening at an advanced stage of the proceedings, it is clear from the pleadings that have been filed in the lawsuit to date have not presented to the Court the full extent of the law that applies to the facts of this case. An examination of the facts as pled by Mr. Smith and the laws set forth above will illustrate that, even accepting the facts in the best possible light for the Plaintiff, he has not pled a case upon which relief may be granted. In reviewing this Motion, the "[p]leadings should be construed liberally, and judgment on the pleadings is appropriate only if there are no disputed issues of material fact and only questions of law remain. [T]he central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief." " *Brittan Communications Int'l Corp. v. Southwestern Bell Tel. Co.*, 313 F.3d 899 (5th Cir. 2002) *cert. denied* 538 U.S. 1034 (2003).

16. In his pleadings, Plaintiff alleges that the "remains of the VESSEL, including

her armament, apparel, tackle, and cargo are, on information and belief, all abandoned maritime property, found, discovered, and confirmed by Mr. Smith." First Amended Original Complaint ("Complaint") at 2, ¶ 7. Further, he alleges that the location of the vessel is "within the navigable waters of the United States such that a person could travel by boat from the VESSEL to the Mission River, from the Mission River to the Gulf of Mexico and other states in the United States." Complaint at 2, ¶ 6. The Handbook of Texas Online notes that the Mission River runs for 24 miles through Refugio County, Texas, with its mouth on Mission Bay. *Handbook of Texas Online*, s.v. http://www.tshaonline.org/handbook/online/articles/MM/rnm9.html (accessed February 1, 2009). *See* Exhibit 1. Thus, it is an inland waterway within the State of Texas.

17. Plaintiff affirmatively pleads that the alleged shipwreck is abandoned, and it is not necessary for the Commission to prove that it is. If it is abandoned, the ASA applies to the vessel. Accepting all of these allegation as true, the ASA applies and the Commission owns title to the alleged shipwreck. Accordingly, Plaintiff's claims under the law of admiralty fail and judgment should be awarded to the Commission on the pleadings under FED. R. CIV. P. 12 (c).

CONCLUSION

18. For the foregoing reasons, the Texas Historical Commission respectfully requests that the Court grant its Motion to Dismiss and dismiss this lawsuit or, alternatively, grant Judgment on the pleadings to the Commission and that the Commission be granted all further relief, in law and in equity, to which it is entitled.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

ANDREW WEBER
First Assistant Attorney General

DAVID A. MORALES
Deputy Attorney General for Civil Litigation

BARBARA B. DEANE
Chief, Environmental Protection and
Administrative Law Division

JOE H. THRASH
State Bar Card No. 19995500
Assistant Attorney General
Environmental Protection and
Administrative Law Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
Telephone (512) 475-4685
Fax (512) 320-0167

ATTORNEYS FOR INTERVENOR
TEXAS HISTORICAL COMMISSION

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been delivered via Certified U. S. Mail, Return Receipt Requested, to counsel of record, on February 3, 2009, as follows:

Ronald B. Walker
Walker, Keeling & Carroll, L.L.P.
210 E. Constitution
P.O. Box 108
Victoria, Texas 77902-0108

Richard A. Schwartz
Schwartz, Junell, Greenberg & Oathout, L.L.P.
909 Fannin Street, Suite 2700
Houston, Texas 77010

JOE H. THRASH

THE HANDBOOK OF TEXAS Online

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MISSION RIVER. The Mission River is formed by the confluence of Blanco and Medio creeks in central Refugio County (at 28°19' N, 97°19' W) and runs southeast, past Refugio, for twenty-four miles to its mouth on Mission Bay, an inlet of Copano Bay (at 28°10' N, 97°10' W). It traverses gently undulating coastal prairies surfaced by clay and loam and spotted by groves of hardwoods and pines. It is home to myriad waterfowl and native slough grasses. In 1795 Spanish friars relocated Nuestra Señora del Refugio Mission[qv] from a site near the junction of the Guadalupe and San Antonio rivers to the banks of the Mission River, a move that probably gave the river its name. On March 14, 1836, a detachment of Texans under Amon Butler King[qv] took a defensive position in one of the groves along the riverbank and repulsed repeated attacks of Mexican general José de Urrea's[qv] troops during the battle of Refugio.[qv] Because the day's fighting nearly exhausted their supplies of gunpowder, King ordered his men to escape that night by swimming across the Mission River; they thus wetted the little powder that remained. The next day a party of Urrea's men overtook and captured King and his troops. The Texans were returned to the mission, where they were executed on March 16.

BIBLIOGRAPHY: William H. Oberste, *Texas Irish Empresarios and Their Colonies* (Austin: Von Boeckmann-Jones, 1953; 2d ed. 1973).

The following, adapted from the *Chicago Manual of Style*, 15th edition, is the preferred citation for this article.

Handbook of Texas Online, s.v. ",", http://www.tshaonline.org/handbook/online/articles/MM/rnm9.html (accessed February 1, 2009).

(NOTE: "s.v." stands for sub verbo, "under the word.")

The *Handbook of Texas Online* is a project of the Texas State Historical Association (http://www.tshaonline.org).

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EXHIBIT
1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NATHAN SMITH	§	
Plaintiff,	§	
	§	
v.	§	
	§	CIVIL ACTION NO. 4:07-00784
THE ABANDONED VESSEL,	§	
In Rem	§	

ORDER GRANTING DISMISSAL FOR FAILURE TO STATE A CLAIM

CAME TO BE CONSIDERED the Texas Historical Commission's Motion to Dismiss or For Judgment [DKT No. ____] and the Court, having considered the motion, the pleadings, and arguments of counsel and parties finds the motion should be GRANTED.

IT IS THEREFORE ORDERED that Intervenor Texas Historical Commission's Motion to Dismiss for Failure to State a Claim is granted and this matter is DISMISSED and all costs are taxed against Plaintiff.

SIGNED February _____, 2009.

____
U.S. DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

NATHAN SMITH	§	
Plaintiff,	§	
	§	
v.	§	
	§	CIVIL ACTION NO. 4:07-00784
THE ABANDONED VESSEL,	§	
In Rem	§	

JUDGMENT

CAME TO BE CONSIDERED the Texas Historical Commission's Motion to Dismiss or For Judgment [DKT No. ____] and the Court, having considered the motion, the pleadings, and arguments of counsel and parties finds the Motion for Judgment on the Pleadings should be GRANTED.

IT IS THEREFORE ORDERED that Intervenor Texas Historical Commission's Motion for Judgment on the Pleadings is granted and JUDGMENT in favor of the Texas Historical Commission is GRANTED, that Plaintiff take nothing by its claims, and all costs are taxed against Plaintiff.

SIGNED February _____, 2009.

____
UNITED STATES DISTRICT JUDGE